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No. 82-979

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Labor Relations Authority reasonably construed the Federal Service Labor-Management Relations Statute (5 U.S.C. (Supp. V) 7101 *et seq.*) and concluded that employees who are on official (paid) time under 5 U.S.C. (Supp. V) 7131(a), while representing an exclusive representative in the negotiation of a collective bargaining agreement, are entitled to payment from their employing agency for travel expenses and per diem.*

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* All the parties in the United States Court of Appeals for the Eighth Circuit are listed in the caption with the exception of the American Federation of Government Employees, AFL-CIO ("AFGE"). AFGE intervened on behalf of the Federal Labor Relations Authority before the Court of Appeals.

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No.

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-24a) is reported at 111 L.R.R.M. 2007 (8th Cir., 1982). The decision and order of the Federal Labor Relations Authority (App. D, *infra*, 28a-33a) is reported at 6 F.L.R.A. No. 45 (July 15, 1981).

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[1] The caption below reads *United States Department of Agriculture* v. *Federal Labor Relations Authority and the American Federation of Government Employees, AFL-CIO.*

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1982 (App. B, *infra*, 25a-26a). A timely petition for rehearing and suggestion for rehearing *en banc* filed by Intervenor-Respondent, American Federation of Government Employees, AFL-CIO, was denied on September 14, 1982 (App. C, *infra*, 27a), and the petition for writ of certiorari has been filed within 90 days of the denial of reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

STATUTES INVOLVED

This case involves Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), which is referred to as the Federal Labor-Management Relations Statute, 5 U.S.C. (Supp. V) 7101 *et seq.* (hereinafter the "Labor-Management Statute"). Of particular relevance to this case are sections 7131(a) and 7101(a) of the Labor-Management Statute.

5 U.S.C. (Supp V) 7131 provides:

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor or-

[2] The Solicitor General has authorized the filing of this petition.

ganization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

> (1) any employee representing an exclusive representative, or
>
> (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. (Supp. V) 7101(a) provides:

(a) The Congress finds that—

> (1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> (A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

5 U.S.C. (Supp. V) 5702(a) provides:

Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

STATEMENT OF THE CASE

1. The Labor-Management Statute governs labor-management relations in the federal service. The Federal Labor Relations Authority (hereinafter "Authority" or "FLRA") was established as an independent agency in the executive branch to administer the Labor-Management Statute, provide leadership in establishing policies and guidance thereunder, and ensure compliance with the statutory rights and obligations of federal employees, labor organizations which represent such employees, and federal agencies. *See* 5 U.S.C. (Supp. V) 7105.[3]

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[3] Congress found that the statutory protection of collective bargaining and employee participation through labor organizations safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of employee-employer disputes involving conditions of employment. 5 U.S.C. (Supp. V) 7101(a). Further, Congress found that labor organizations and collective bargaining in the civil service are in the public interest. *Id.* Consistent with these findings, the Labor-Management Statute requires an agency to accord exclusive recognition to a union elected as the representative by employees in an appropriate bargaining unit as determined by the Authority. 5 U.S.C. (Supp. V) 7111(a). A union which has been accorded exclusive recognition represents, and is entitled to act for and negotiate collective bargaining agreements covering, all employees in the unit. 5 U.S.C. (Supp. V) 7114(a)(1). The union must represent the interests of all employees in the unit without discrimination and without regard to union membership. *Id.*

After a union has been accorded exclusive recognition, the agency and union have a duty to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. 5 U.S.C. (Supp. V) 7114(a)(4). This duty includes the parties' obligation to be represented at negotiations by authorized representatives prepared to discuss and negotiate on any condition of employment, and to meet at reason-

Congress has entrusted the Authority with, among other things, the power to determine appropriate units for union representation, conduct representation elections, decide issues relating to the statutory duty to bargain in good faith, resolve unfair labor practice complaints, rule on exceptions to arbitrators' awards, and take such other actions as are necessary and appropriate to administer effectively the provisions of the Labor-Management Statute. 5 U.S.C. (Supp. V) 7105(a)(2)(A), (B), (E), (G), and (I), respectively.[4]

The Authority is empowered to issue orders against unfair labor practices (5 U.S.C. (Supp. V) 7118) and to seek enforcement of those orders in appropriate United States courts of appeals. 5 U.S.C. (Supp. V) 7123(b).[5] Persons, including federal

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able times and convenient places as frequently as may be necessary. 5 U.S.C. (Supp. V) 7114(b)(2) and (3). Moreover, an agency is required to grant official (paid) time to an employee representing an exclusive representative in the negotiation of a collective bargaining agreement. 5 U.S.C. (Supp. V) 7131(a).

[4] Prior to creation of the Authority and enactment of the Labor-Management Statute, labor-management relations in the federal service had been governed by Executive orders. *See* Executive Order 10988, 3 C.F.R. 521 (1959-1963 Compilation) and Executive Order 11491, as amended, *reprinted in* 5 U.S.C. (Supp. V) 7101 note at 312.

[5] The Labor-Management Statute proscribes certain conduct by agencies or unions as unfair labor practices. For example, an agency may not "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this [Labor-Management Statute]" (5 U.S.C. (Supp. V) 7116(a)(1)) or "otherwise fail or refuse to comply with any provision of this [Labor-Management Statute]" (5 U.S.C. (Supp. V) 7116(a)(8)).

agencies and unions, aggrieved by final orders of the Authority may seek judicial review in the courts of appeals. 5 U.S.C. (Supp. V) 7123(a).

2. Local 3748, American Federation of Government Employees (hereinafter "union") was the exclusive representative of a bargaining unit consisting of certain employees of the United States Department of Agriculture (hereinafter "USDA" or "agency") and comprising facilities in Fargo, Grand Forks and Mandan, North Dakota; Brookings, South Dakota; and Palmer, Alaska (App. A, *infra*, 8a). Representatives of the union and the agency met in Fargo on four occasions in 1980 to negotiate a collective bargaining agreement. In order to participate in these negotiation sessions, five bargaining unit employees representing the union and on official (paid) time traveled on various days from Mandan or Brookings to Fargo (*id.*). The agency refused to approve, grant or pay any travel advances or travel and per diem expense claims for any of these properly designated members of the union's negotiating team, although it approved the travel authorization requests for its own negotiating team members for travel expenses and per diem incurred. The union filed unfair labor practice charges against the agency with the Authority. The Authority found that the agency had committed unfair labor practices by refusing to authorize such payments (*id.*).

In so finding, the Authority explicitly relied upon and adopted its Interpretation and Guidance (hereinafter "Interpretation") issued on December 19, 1979 (2 F.L.R.A. No. 31, App. E, *infra*, 34a-46a). There, the Authority concluded that employees on official time under 5 U.S.C. (Supp. V) 7131(a), while representing a union in the negotiation of a collective bargaining agreement with an agency, are

entitled to payment from that agency for their travel expenses and per diem.

In support of its conclusion, the Authority specifically noted Congress' express rejection of attempts to incorporate the restrictive official time policies of Executive Order 11491, as amended, *reprinted in* 5 U.S.C. (Supp. V) 7101 note at 312, under which payment of travel expenses and per diem was not authorized, into the Labor-Management Statute (App. E, *infra*, 41a n.6). In this regard, while acknowledging that neither the language nor the legislative history of the Labor-Management Statute expressly adverts to payment of travel expenses or per diem, the Authority pointed out that the official time provisions under 5 U.S.C. (Supp. V) 7131(a) are completely different from those of the rejected Senate bill, which sought to maintain the language of the official time provisions under the Executive Order. Thus, unlike under the Executive Order which strictly limited the amount of official time which might be authorized for negotiation activities by employee union representatives, section 7131(a) contains no such limitation. As explained by the House Report, such employee is on "paid time" and entitled to his or her usual compensation. H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978) (App. E, *infra*, 41a). The Authority further explained that unlike under the Executive Order, the encouragement of collective bargaining is a stated purpose of the Labor-Management Statute (*id.*).

Additionally, the Authority emphasized that, under the Labor-Management Statute, employees participating in negotiation activities pursuant to 5 U.S.C. (Supp. V) 7131(a) are engaged on official government business and are therefore authorized payment of travel and per diem expenses, under 5 U.S.C.

(Supp. V) 5701 *et seq.* (App. E, *infra*, 42a). The Authority concluded that its determination that such employees are engaged on "official business for the Government" is compelled because of Congress' specific finding that collective bargaining is in the public interest and contributes to the effective conduct of public business, and from the statutory requirement that parties conduct their negotiations in good faith, including meeting at reasonable times and convenient places as frequently as may be necessary. *See* 5 U.S.C. (Supp. V) 7101(a), 7114, 7116(a)(5) and (b)(5) (App. E, *infra*, 42a).

Moreover, as explained by the Authority, the payment of travel expenses and per diem also implements Congress' intent more nearly to equate the status of union and management negotiators. Reducing this inequality facilitates more effective union representation at the bargaining table, which in turn encourages collective bargaining and contributes to the effective conduct of public business. 5 U.S.C. (Supp. V) 7101(a). In this connection, the Authority stated that agencies uniformly pay travel expenses and per diem for management negotiators, and Congress indicated in the legislative history that similar prerogatives are to be accorded employees serving as union negotiators under 5 U.S.C. (Supp. V) 7131(a).[6] (App. E, *infra*, 42a-43a.)

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[6] The Authority quoted the following statement of Congressman Clay (124 Cong. Rec. 29188 (1978)):

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization. . . . Activities that involve labor-management contacts are not included in this section. . . . Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory

Finally, as the Authority pointed out, this conclusion is consistent with its previous interpretation of identical language in section 7131(c) which entitles employees on official time in Authority proceedings to travel and per diem expenses. 5 C.F.R. 2429.13 (1982). (*Id.* at 43a-44a.)

In view ofthe foregoing, the Authority ordered the agency to cease and desist from failing or refusing to provide payment of properly documented travel and per diem expenses to its employees participating on official time in collective bargaining under section 7131(a) of the Labor-Management Statute as duly designated representatives of the union, and to take appropriate affirmative action (App. D, *infra* at 30a-33a).

3. The court of appeals, in a 2-1 decision, denied enforcement of the Authority's order. The majority declined to defer to the Authority's interpretation, stating that "the [Authority's] position rests, at least in part, on its interpretation of 5 U.S.C. § 5702, a provision not within the [Authority's] enabling statute" (App. A, *infra*, 11a-12a). Contrary to the Authority, the majority concluded: "[B]ecause we are unwilling to impose additional financial liability on the Government without an affirmative directive from Congress, we prefer the interpretation that does not make the Government liable for these [travel and per diem] expenses" (*id.* at 12a).

In that regard, the majority indicated that it did not consider the congressional statements of purpose found in 5 U.S.C. (Supp. V) 7101 to be pertinent

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representational activities *just as* management uses official time to carry out its responsibilities. (Emphasis in Interpretation.)

(*Id.*)

(*id.* at 14a). According to the court, "[w]hile collective bargaining is generally in the public interest, employees representing their unions in collective bargaining do not primarily advance the interest of the Government. Instead employee representation in collective bargaining primarily benefits the employees and their union, only indirectly benefiting the USDA by contributing to the effective conduct of its business" (*id.* at 13a-14a). The majority further concluded that rejection of the Senate version of the official time provision, which would have incorporated the official time provision from Executive Order 11491, as amended, "reflects at most, a desire to alter the official time provision, indicating nothing about the Congressional view of travel expenses and per diem" (*id.* at 15a-16a). Finally, the majority rejected the Authority's determination that providing employee negotiators with travel expenses and per diem would effectuate the purpose of the Labor-Management Statute by more nearly equalizing the status of the parties in bargaining (*id.* at 16a-18a).[7]

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[7] In a separate opinion, Circuit Judge Heaney dissented from the majority's decision. On the merits, the dissent stated that while the Authority's "analysis may not be the only plausible interpretation, . . . it is a reasonable one and is well within the scope of the agency's authority" (*id.* at 24a). In that regard, the dissent noted that the majority's failure to accord deference to the Authority's decision "ignores the fact that the core of the FLRA's analysis was based on its interpretation of federal labor relations policy, a matter within its specialized authority and deserving of obvious deference" (*id.* at 23a n.2).

The dissent further concluded that "even under the standard of review recognized by the majority," the Authority's decision must be affirmed (*id.* at 24a):

> The contrary conclusion reached in this case [by the majority] is not required by the statute or its legislative

REASONS FOR GRANTING THE PETITION

In *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority and National Treasury Employees Union*, petition for cert. pending, No. 82-799 (filed November 10, 1982), the Solicitor General, on behalf of the Bureau of Alcohol, Tobacco and Firearms, has sought review of a decision of the Ninth Circuit involving precisely the same issue raised in the petition in the instant case.[8] The

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history, which is conceded to be silent. It is not required by prior administrative practice, which is itself erratic and inconsistent. Moreover, it is not justified by the policy arguments relied upon by the majority, unless this Court is empowered to freely substitute its judgment for that of the agency. In my view, when Congress broadly empowers an independent agency to regulate federal labor relations, courts should not interfere with that agency's policy determination absent a clear showing that the decision is unreasonable, exceeds its authority, or is contrary to law. No such showing has been made here.

[8] In both cases the courts of appeals were called upon to review the Authority's determination, as explicated in its Interpretation and Guidance (App. E, *infra* at 34a-46a), that employees, on official (paid) time under 5 U.S.C. (Supp. V) 7131(a), while representing an exclusive representative in collective bargaining negotiations, are entitled to payments from their employing agency for travel expenses and per diem.

The same issue was decided adversely to the Authority by the Second Circuit in a 2-1 decision, with a separate disssenting opinion, in *Division of Military and Naval Affairs, State of New York* v. *FLRA*, 683 F.2d 45 (2d Cir. 1982), rehearing denied (2d Cir. Sept. 17, 1982). Other cases involving the same issue are also pending in the Eleventh and District of Columbia Circuits. *See e.g., Florida National Guard* v. *FLRA*, No. 81-5466 (11th Cir., argued Sept. 1, 1982); *Bureau of the Mint and United States Customs Service* v. *FLRA*, Nos. 82-1194, 82-1195 (D.C. Cir. filed Feb. 24, 1982).

Ninth Circuit, in a unanimous decision, enforced the Authority's order and denied the petition for review filed by the Bureau of Alcohol, Tobacco and Firearms.[9]

In a memorandum filed in response to the petition for a writ of certiorari in that case (filed December 13, 1982), the Authority urged that the Ninth Circuit's decision was correctly decided. However, in view of the conflict in the circuits and the importance and recurrent nature of the issue, the Authority indicated that it did not oppose granting of the petition.

CONCLUSION

The instant petition for a writ of certiorari should be held and disposed of in light of the disposition of *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, No. 82-799.

Respectfully submitted.

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[9] The Ninth Circuit's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA* is reported at 672 F.2d 732 (1982). In its opinion in that case, the Ninth Circuit concluded (672 F.2d at 738):

> The FLRA's Interpretation and Guidance is reasoned and supportable, and therefore will be given deference by this Court. The FLRA, acting in its own area of expertise, has interpreted the relevant language of Title VII [the Labor-Management Statute] in a clearly defensible manner, and we are neither permitted not inclined to substitute a different judgment.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-1948

UNITED STATES DEPARTMENT OF AGRICULTURE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

and

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, INTERVENOR/RESPONDENT

Submitted: March 9, 1982

Filed: August 9, 1982

Before HEANEY, BRIGHT, and HENLEY *, Circuit Judges

ON PETITION FOR REVIEW OF ORDER OF FEDERAL LABOR RELATIONS AUTHORITY

BRIGHT, Circuit Judge.

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* Judge Henley assumed senior status on June 1, 1982.

This case reaches this court on a petition to review and cross-application for enforcement of a Federal Labor Relations Authority (FLRA) decision finding that the Department of Agriculture (USDA) committed an unfair labor practice. The USDA refused to pay travel expenses and per diem for employees acting as union representatives in collective bargaining negotiations with the USDA. The case presents this court with a narrow issue: whether the Government must pay travel expenses and per diem to federal service employees who represent their unions in contract negotiations with government agencies. We hold that the Government need not make these payments.

I. *Federal Labor Relations History.*

This case arises under the Civil Service Reform Act of 1978 (the Act), 5 U.S.C. §§ 7101-7135 (Supp. IV 1980). The Act codified the federal service labor relations program previously governed by executive order. We therefore briefly review these orders as background for this decision.

In January 1962, President Kennedy promulgated Executive Order 10988, *see* 3 C.F.R. 531 (Comp. 1959-63), which governed federal service labor-management relations between 1962 and 1969. Under Executive Order 10988, the granting of "official time" [1] to employees serving as union representatives

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[1] Official time in this context means paid time. *National Federation of Federal Employees* v. *FLRA*, 652 F.2d 191, 194 (D.C. Cir. 1981); *see* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978).

was solely within the agency's discretion. The Executive Order, however, did not provide for the payment of travel expenses or per diem.[2] In 1970, Exec-

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[2] Section 9 of Executive Order 10988 provided:

> Solicitation of memberships, dues, or other internal employee organization business shall be conducted during the non-duty hours of the employees concerned. Officially requested or approved consultations and meetings between management officials and representatives of recognized employee organizations shall, whenever practicable, be conducted on official time, but any agency may require that negotiations with an employee organization which has been accorded exclusive recognition be conducted during the non-duty hours of the employee organization representatives involved in such negotiations. [Exec. Order No. 10988, sec. 9, 3 C.F.R. 531 (Comp. 1959-63), *reprinted in* Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 at 1215 (Comm. Print 1979) (Legis. Hist.).]

Interpreting this section, the Comptroller General held that the Executive Order did not contemplate paying travel expenses to employees representing unions in negotiations. Because an agency could require negotiations during nonduty hours, the Comptroller General reasoned that the time spent by the employees did not qualify as official business. 44 Comp. Gen. 617, 618 (1965). The Comptroller General added the following comment:

> As reflected in the Executive order such negotiations may contribute to the effective conduct of public business, but we cannot agree that the negotiation duties rendered by an employee representative are official duties or business rendered on behalf of the United States. On the contrary it would seem that such negotiations by employee repre-

utive Order 11491 became effective, superseding Executive Order 10988. It authorized the Federal Labor Relations Council as the central authority to oversee federal service labor-management relations. Executive Order 11491 provided that employees representing a union in negotiations with management would not receive official time.[3] This provision re-

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sentatives are primarily in the interest of the employee organization. [*Id.*]

The Comptroller General later altered its position on payment of travel expenses for employee organization representatives after the Civil Service Commission promulgated technical guidelines concerning reimbursement for travel expenses incurred in connection with negotiations. These guidelines provided:

> As a general practice, travel expenses should not be paid to attend negotiation sessions for the purpose of negotiating an agreement. When consultation or special negotiation meetings are called by the agency, the agency has the latitude to pay travel expenses where the particular circumstances justify the payment. An agency, for example, may find that it would be in the primary interest of the Government to hold a meeting at a site selected by the agency and more economical to pay travel costs for the employee organization representatives than it would be to pay travel costs for the agency representatives. [46 Comp. Gen. 21, 21-22 (1966).]

At the time of the previous decision, it noted that no guidelines existed by which to determine whether these expenses could be deemed to have been incurred "primarily in the interest of the United States * * *." *Id.* at 22. The Comptroller General therefore modified the prior decision to permit payments for travel expenses incurred in accordance with the guidelines. *Id.*

[3] Section 20 of Executive Order 11491 provided:

> Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted dur-

flected the belief that an employee works for the labor organization when negotiating an agreement on behalf of a federal employees union. Report of the Federal Labor Relations Council (FLRC Report), Legis. Hist. at 1167.

One year after the issuance of Executive Order 11491, the Federal Labor Relations Council initiated a review and assessment of its operations under the Executive Order. This review resulted in the promulgation of Executive Order 11616, which amended Executive Order 11491 to incorporate the suggested changes. FLRC Report, Legis. Hist. at 1168. Executive Order 11616, which became effective in November 1971, modified the original prohibitions on the payment of official time to permit an agency and a union to agree to a reasonable amount of official time for employees representing unions in negotiations. Specifically, an employee could receive up to 40 hours or up to one-half the time spent in negotiations during working hours.[4] This order eliminated the abso-

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ing the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management. [Exec. Order No. 11491, sec. 20, 3 C.F.R. 861, 873 (Comp. 1966-70), Legis. Hist. at 1255.]

[4] Executive Order 11616 amended section 20 to read:

Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except to the extent that the negotiating parties agree to other arrangements which may provide that the agency will either authorize

lute prohibition on official time to avoid undue hardship on employees who represented the union, but expressly limited the amount of official time "to maintain a reasonable policy with respect to union self-support and an incentive to economical and businesslike bargaining practices." FLRC Report, Legis. Hist. at 1169. Executive Order 11491, as amended, however, did not authorize agencies to pay travel expenses or per diem for employees serving as union negotiators. FLRC Report, Legis. Hist. at 1264. Executive Orders 11636 and 11838 further amended Executive Order 11491, but did not change the provisions at issue here.

In 1978, Congress passed the Civil Service Reform Act of 1978, for the first time codifying the federal service labor relations program. In response to criticism of the Federal Labor Relations Council, Congress established a new body along the lines of the National Labor Relations Board, which it named the Federal Labor Relations Authority (FLRA). *See Department of Defense* v. *FLRA*, 659 F.2d 1140, 1144-45 (D.C. Cir. 1981) (outlining authority of FLRA), *cert. denied*, 50 U.S.L.W. 3669 (1982). Congress did not specifically authorize travel expenses or per diem for employees acting as union representatives in collective bargaining sessions, stating only that these employees should receive official

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official time for up to 40 hours or authorize up to one-half the time spent in negotiations during regular working hours, for a reasonable number of employees, which number normally shall not exceed the number of management representatives. [Exec. Order No. 11616, sec. 20, 3 C.F.R. 605, 608 (Comp. 1971-75), Legis. Hist. at 1271.]

time "during the time the employee otherwise would be in a duty status." 5 U.S.C. § 7131(a) (Supp. IV 1980).[5]

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[5] The full text of § 7131 provides:

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter *shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status.* The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest. [5 U.S.C. § 7131 (Supp. IV 1980) (emphasis supplied).]

II. *Factual Background.*

The parties stipulated to the facts in this case. Local 3748 of the American Federation of Government Employees (Union) represents the bargaining unit, which consists of certain employees of the Department of Agriculture (USDA) located in Fargo, Grand Forks, and Mandan, North Dakota; Brookings, South Dakota; and Palmer, Alaska. Five USDA employees traveled from Mandan and Brookings to Fargo on four occasions in 1980 to participate in negotiations on behalf of the Union. The employees received time off with pay from their usual duties during negotiations, but the USDA refused their request for travel expenses and per diem.

When the USDA refused to reimburse the employees for their travel expenses and per diem, the Union filed an unfair labor practice charge with the FLRA. *See* 5 U.S.C. § 7118 (Supp. IV 1980). The FLRA regional office issued a complaint which it later supplemented with another charge for the same conduct. The complaints were consolidated and set for hearing before an administrative law judge in Fargo, but then were transferred directly to the FLRA. *See* 5 C.F.R. § 2429.1(a) (1980).

On July 15, 1981, after briefing, the FLRA issued its decision finding that the USDA had committed unfair labor practices under sections 7116(a)(1) and (8),* by denying travel and per diem payments to

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* Under this section, it is an unfair labor practice

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; * * * *; or

(8) to otherwise fail or refuse to comply with any provision of this chapter. [5 U.S.C. § 7116(a)(1), (8) (Supp. IV 1980).]

USDA employees while they represented the union in contract negotiations. In reaching this decision, the FLRA relied primarily on an earlier official interpretation in which it held government employees entitled to travel expenses and per diem while representing their union in negotiations. Interpretation and Guidance, 2 FLRA 264, 270 (1979) (Interpretation).

In the Interpretation, the FLRA first noted that section 7131 of the Act requires that employees be granted official (paid) time while negotiating during hours they would otherwise have been on duty status. It conceded that neither the language of the Act, nor the legislative history, directly addressed payment of travel expenses and per diem, but concluded that employees representing the union in collective bargaining nevertheless should receive travel expenses and per diem because they were engaged in the official business of the Government. The FLRA considered the conclusion compelled by congressional findings that collective bargaining is in the public interest and that it contributes to the effective conduct of public business. *See* 5 U.S.C. § 7101(a) (Supp. IV 1980). Because other government employees traveling on official business received travel expenses and per diem, *see* U.S.C. § 5702 (1976), the FLRA concluded that employees acting as union negotiators should also receive travel expenses and per diem.

The USDA petitioned this court, under 5 U.S.C. § 7123(a), for review of the FLRA's final determination ordering the USDA to pay travel expenses for the five employees involved and to desist from any refusal to make these payments in the future. The FLRA cross-petitioned for enforcement of its order under 5 U.S.C. § 7123(b), while the American Fed-

eration of Government Employees (AFGE) intervened to support the FLRA position.[7]

III. *Discussion.*

In reaching our decision, we consider three areas of inquiry: (1) whether the FLRA construction of the Act, embodied in its Interpretation, is entitled to any deference; (2) whether the legislative history sheds any light on the proper construction of the language of the Act; and (3) whether public policy or other considerations support the FLRA's construction of the Act.

A. *Standard of Review.*

The FLRA correctly contends that our review of its action is limited. The Civil Service Reform Act provides that judicial review of FLRA decisions "shall be on the record in accordance with section 706 [of Title V]." 5 U.S.C. § 7123(c) (Supp. IV 1980). Section 706 states that agency action should be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706 (1976). As the D.C. Circuit recently stated: "[i]f the FLRA's construction of the statute is reasonably defensible, we are not free to reject it merely because we might decide differently if confronted with the question in the first instance." *Department of Defense* v. *FLRA*, *supra*, 659 F.2d at 1162 n.121.

This standard, however, does not require that we summarily affirm every FLRA action, especially

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[7] The National Treasury Employees Union (NTEU) filed a brief as amicus curiae. The NTEU, the AFGE, and the FLRA advance similar arguments. We will refer to all arguments as if made solely by the FLRA.

where, as here, the issue turns on statutory construction.

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153-154. But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291. [*SEC* v. *Sloan*, 436 U.S. 103, 118 (1978) (*quoting Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968)).]

Although technically the USDA has invoked this court's jurisdiction to review an FLRA decision that the USDA committed an unfair labor practice, the parties agree that the outcome depends on whether the FLRA correctly interpreted the Act to require those payments. The FLRA maintains that an employee negotiator on "official time," as used in section 7131 [8] of the Act, necessarily engages in official business under 5 U.S.C. § 5702.[9] We do not agree.

While we recognize that the FLRA's interpretation of its own statute deserves some deference, here the

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[8] *See* note 5 *supra*.

[9] Section 5702 provides for the payment of per diem expenses to "an employee while traveling on official business away from his designated post of duty." [5 U.S.C. § 5702 (1976).]

FLRA's position rests, at least in part, on its interpretation of 5 U.S.C. § 5702, a provision not within the FLRA's enabling statute. It contends that employees representing their unions in collective bargaining engage in official business within the meaning of that provision. Because the FLRA has no special expertise in interpreting section 5702, however, we need not defer to its interpretation. *See Tsosie* v. *Califano*, 651 F.2d 719, 722 (10th Cir. 1981); *March* v. *United States*, 506 F.2d 1306, 1316 (D.C. Cir. 1974).

B. *Legislative History.*

The parties agree that nothing in the language or legislative history of the Act mentions the payment of travel expenses or per diem. Thus, the FLRA's Interpretation assumes that Congress authorized additional expenditures to cover travel expenses and per diem without making even an oblique reference to that effect. Because we are unwilling to impose additional financial liability on the Government without an affirmative directive from Congress, we prefer the interpretation that does not make the Government liable for these expenses. *See Brookfield Construction Co.* v. *United States*, 661 F.2d 159, 163-64 (Ct. Cl. 1981).

The FLRA argues that congressional findings that collective bargaining "contributes to the effective conduct of public business," and that "collective bargaining [is] in the public interest," 5 U.S.C. § 7101(a) (Supp. IV 1980),[10] support its conclusion that em-

[10] Section 7101(a) provides:

> The Congress finds that—
>
> (1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and par-

ployee negotiators are entitled to travel expenses and per diem. The FLRA also maintains that travel expenses and per diem were not allowed under the prior executive orders because those orders contained no clear statement that collective bargaining was in the public interest. Now, however, Congress has supplied such a statement manifesting its clear intent to allow travel expenses and per diem.

First, the FLRA's position assumes that employees acting as union negotiators must be engaged in official business for the Government, *see* Interpretation, *supra*, 2 FLRA at 269, because collective bargaining fulfills the purposes enumerated in section 7101(a). Its position, therefore, ignores the difference between the interest of the public at large and the interest of the Government as employer. While collective bargaining is generally in the public interest, employees representing their unions in collective bargaining do not primarily advance the interest of

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ticipate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

the Government.[11] Instead, employee representation in collective bargaining primarily benefits the employees and their union, only indirectly benefiting the USDA by contributing to the effective conduct of its business. *See* 44 Comp. Gen. 617, 618 (1965).[12] For these reasons, we do not consider these congressional statements of intent pertinent.

The FLRA also argues that Congress indicated its desire to allow payment of travel expenses and per diem by rejecting the Senate version of the official time provision, which would have incorporated the official time provision from Executive Order 11491, as amended. That provision allowed the parties to

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[11] According to the Comptroller General, an activity must be "in the best interest of the Government," 44 Comp. Gen. 188, 190 (1966), or "primarily in the interest of the United States," 46 Comp. Gen. 21, 22 (1966), to qualify as official business under 5 U.S.C. § 5702.

The FLRA maintains that these Comptroller General decisions, which interpreted official time provisions under prior executive orders, are without effect. It bases its contention on the radical change in the language of official time provisions under prior executive orders and a General Accounting Office decision declaring previous decisions superseded to the extent of any conflict with 5 U.S.C. § 7131. We do not cite these decisions, however, for their precedential value on the allowance of travel expenses and per diem. Instead, these cases set forth the standard for determining "official business" under 5 U.S.C. § 5702, a term nowhere mentioned in 5 U.S.C. § 7131. These decisions, therefore, still carry some weight.

[12] Indeed, if we were to accept the FLRA's argument that the statements of purpose found in § 7101 are sufficient to make the activity official business under 5 U.S.C. § 5702, we might be forced to compel union funding by the USDA as well because § 7101 also states that labor organizations are in the public interest. *See* note 10 *supra*. Clearly, Congress did not intend such a result.

negotiate authorization of official time for up to forty hours or up to one-half the time spent in negotiations during regular working hours.[13] The FLRA reasons that by adopting completely new language, allowing official time for hours spent in negotiations if the employee would otherwise be in a duty status, Congress intended to reject the Executive Order's limitations of official time, including its prohibition on travel expenses and per diem.[14]

We find this argument unpersuasive. In the absence of any comment in the legislative history, we cannot know why Congress rejected the Senate version. In addition, any change reflects, at most, a desire to alter the official time provision,[15] indicating

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[13] *See* note 4 *supra* for the full text of that provision.

[14] Along these same lines, the FLRA maintains that it is not bound by interpretations of official time provisions under the prior executive orders because Congress intended the FLRA to take a fresh approach to labor-management relations. It supports its argument by reference to Representative William Clay's statement that "the Authority is in no way bound to the Council's past decisions, even where language in title VII is identical to that in the Executive order." 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978), Legis. Hist. at 932. A reading of the entire passage, however, indicates that Representative Clay was specifically concerned with the Council's restrictive interpretation of the scope of collective bargaining under the prior Executive Order. Moreover, as already pointed out, it was the Comptroller General, and not the Federal Labor Relations Council, that prohibited payment of travel expenses and per diem, reasoning that the expenses were not generally incurred in the course of official business. The Council, therefore, was not involved in the prior restrictive interpretation that the FLRA would like to discard.

[15] We note that even the extent of the congressional alteration of the official time provision is ambiguous. Congress adopted language providing official time "during the time the

nothing about the congressional view of travel expenses and per diem. If anything, congressional silence would point towards its acceptance of prior practice, which did not allow travel expenses and per diem.[16]

C. *Policy.*

The FLRA argues that providing employee negotiators with travel expenses and per diem would effectuate the purpose of the Act by more nearly equalizing the status of the parties in bargaining.[17] It observes that management representatives uniformly receive

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employee otherwise would be in a duty status." *See* note 5 *supra*. It rejected language allowing parties to agree to authorization of official time "up to 40 hours or * * * up to one-half the time spent in negotiations during regular working hours[.]" *See* note 4 *supra*. While we need not determine the exact effect of this change, the ambiguity also undercuts the FLRA's position that Congress specifically rejected the restrictive provisions of the prior Executive Order.

[16] The FLRA has also argued that there was no need for Congress to address specifically travel expenses and per diem, because "official time" means "duty" status and because travel expenses are automatically permitted when an employee must travel in connection with that duty status. The plain language of § 7131, however, belies this contention because it authorizes official time only when the employee "otherwise would be in a duty status." If official time meant duty status, the quoted phrase would become superfluous. We cannot accept such an interpretation.

[17] Along similar lines, the FLRA argues that refusal to provide travel expenses and per diem will result in a disparity of bargaining power because hostile federal managers will be able to extend negotiations, requiring heavy expenditures by the union. We reject this argument because the Act requires both parties to bargain in good faith. *See* 5 U.S.C. § 7114(a)(4) (Supp. IV 1980).

travel expenses and per diem when engaged in negotiation of a collective bargaining agreement on behalf of the agency. It argues that Congress indicated its intent that similar prerogatives be accorded employees serving as union representatives. Interpretation, *supra*, 2 FLRA at 269-70. In support of its assertion, the FLRA quotes Representative William Clay:

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization. The section also lists three such activities reflecting our intention that "internal business" be strictly construed to apply only to those activities regarding the structure and institution of the labor organization. Activities that involve labor-management contacts are not included in this section. Nor is preparation for such activities, such as grievances, bargaining, unfair labor practice proceedings, included within this section. Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities. [124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978), Legis. Hist. at 934.]

This statement, however, specifically refers to grants of official time only. It makes no reference to treating union and management representatives alike in every instance and mentions nothing about payment of travel expenses and per diem. Moreover, the Act itself creates inequities between management and labor.

For example, union representatives receive official time only while they would otherwise be in a duty status, *see* 5 U.S.C. § 7131(a) (Supp. IV 1980), while there is no such limitation for agency representatives.[18]

IV. *Conclusion.*

Accordingly, we deny enforcement of its order.[19]

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[18] The FLRA also indicates that it has previously interpreted § 7131(c), which contains the same language, to entitle employees to payment for travel expenses and per diem during proceedings before the FLRA. It argues that this previous interpretation somehow supports its interpretation in this case. We note, however, that no court has passed on the validity of this interpretation. The FLRA's attempt to bootstrap its present interpretation must therefore fail.

[19] We note that in a recent opinion, *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 672 F.2d 732 (9th Cir. 1982), the Ninth Circuit reached the opposite conclusion. The Second Circuit, however, has recently denied enforcement of an FLRA order requiring the New York National Guard to pay travel expenses and per diem incurred by representatives of civilian employees engaged in collective bargaining with the Guard. *Division of Military and Naval Affairs, State of New York* v. *FLRA*, No. 82-4036 (2d Cir. June 28, 1982).

HEANEY, Circuit Judge, dissenting.

The majority recognizes that this case turns on the validity of a formal *Interpretation and Guidance* issued by the FLRA in 1979. *See* 2 F.L.R.A. 264; slip op., *supra*, at 8, 10. In my view, this Court lacks jurisdiction to hear the USDA's belated attack on that determination. Moreover, even if jurisdiction is proper, the majority has wrongly substituted its judgment for that of the agency, exceeding the standard of review which it nominally concedes is applicable here. For both of these reasons, I respectfully dissent.

The FLRA, pursuant to 5 U.S.C. § 7105(a)(1), issued a formal interpretive ruling in 1979 to the effect that employees on official time in connection with collective bargaining negotiations are entitled to travel and per diem expenses for such activity. 2 F.L.R.A. 264. Here, there is no dispute that the employees were on such official time—the only issue is the USDA's challenge to the 1979 interpretive ruling. A party aggrieved by a final FLRA order, however, has only sixty days in which to seek judicial review in either the District of Columbia Circuit or the circuit where that party resides or transacts business. 5 U.S.C. § 7123(a). The present claim is thus time-barred and should be dismissed for lack of jurisdiction if the 1979 *Interpretation* is a final order and the USDA can be held to have been bound thereby.

The 1979 *Interpretation* was not a unilateral advisory opinion. The agency gave notice of its intention and invited comments. *See* 44 Fed. Reg. 42778 (July 20, 1979). The USDA submitted comments objecting to payment of travel and per diem expenses, as did the Office of Personnel Management, the General Services Administration, and the Justice Department. It is clear from such comments that the parties understood

the FLRA would issue a broad policy interpretation, not an isolated determination. It is equally clear that such formal *Interpretations* operate in the FLRA as precedents. *Cf.* 7 F.L.R.A. 70 (December 29, 1981). Under the established concept of finality, the *Interpretation* was thus a final order[1] and the USDA, having participated therein, was certainly an aggrieved party.

Had the USDA and other federal agencies appealed the 1979 *Interpretation*, presumably in the District of Columbia Circuit, there would have been one judicial determination of the ruling's validity—appealable to the Supreme Court—and a uniform result could have been obtained. Instead, the USDA and other federal agencies chose to ignore the 1979 *Interpretation* in favor of circuit-by-circuit attack upon its validity. This is achieved by refusing to comply with the *Interpretation* in specific regional instances and, when such refusal is deemed an unfair labor practice, seeking judicial review in the circuit where the refusal arose. The result of this approach is confusion, contradictory rulings and a tremendous waste of judicial resources. Cases attacking the 1979 *Interpretation* are now pending in several circuits; the Ninth Circuit has upheld the *Interpretation* and this Court now reverses

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[1] Although the FLRA's enabling statute does not define "final order," the Administrative Procedure Act's definition of an "order" includes a "final disposition * * * declaratory in form." 5 U.S.C. § 551(b). This is precisely what the 1979 *Interpretation* constitutes. The present case, moreover, shows that the *Interpretation* operates as a final disposition. When the USDA refused to make travel and per diem payments at one of its regional offices, the union's complaint was transferred to the FLRA's Washington, D.C., office and a rather summary order was issued, relying on the 1979 *Interpretation*.

it. *See* slip op., *supra*, at 16. Consequently, whether two federal employees will receive travel and per diem, under identical circumstances, now arbitrarily turns on the part of the country in which they work. Even within the same agency, employees will receive or not receive such payments depending upon the regional office to which they are attached.

In my view, this is nonsense. Moreover, it frustrates the congressional intent to achieve a uniform policy toward its employees and is achieved through forum-shopping practices that violate the judicial review provisions of the FLRA enabling statute. Where disputes arise that require case-by-case determination, that Act provides the nearest circuit court as a forum for appeal. Here, however, the only issue is a clear policy question of uniform scope. Federal agencies should not be permitted to participate administratively in that policy formulation, waive their appeal from that determination, and then cause nothing but confusion and contradiction by challenging the determination in circuit after circuit. Accordingly, I would dismiss the USDA's petition for lack of jurisdiction.

I also dissent from the majority's decision on its merits. The Ninth Circuit recently upheld the FLRA's *Interpretation* in a well-reasoned opinion. *See Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 672 F.2d 732, 737-738 (9th Cir. 1982). Here, the majority concedes that the scope of our review is "limited" and that the FLRA action cannot be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Slip op., *supra*, at 9. In my view, regardless of whether one likes the idea of paying travel expenses of federal employees to negotiate with their employer, it seems clear that the FLRA has the authority to

make such a determination and that its determination is a reasonable one under the circumstances.

Prior to passage of the 1978 Civil Service Reform Act, which created the FLRA, both "official time" and travel expense questions were governed by a series of executive orders. Some of these orders permitted bargaining on "official time," in the discretion of the employer-agency; some placed a ceiling on such payments; and some totally prohibited bargaining on official time. *See* slip op., *supra*, at 2-5. Travel expense questions obviously would not arise when bargaining could only take place on off-duty rather than official time. When bargaining was at least in part on official time, however, the Comptroller General had construed the executive orders as permitting payment of travel expenses under at least some circumstances. *Id.* at n.2.

The 1978 Civil Service Act must be viewed against this background of conflicting and inconsistent practices. Under the Act, Congress created the FLRA as an independent agency and conferred upon the agency broad regulatory powers relative to labor relations in the federal government. Among other things, the Act also broadly provided that collective bargaining negotiations would be on official time, limited only in that the number of employee negotiators could not exceed the number of employer representatives. The statute and its legislative history are silent on whether travel expenses are payable in connection with such official time activity. The FLRA determined that they were so payable.

The majority appears to argue that congressional silence reflects an intent to reaffirm the prior practice which generally denied travel expenses, and that this Court should not authorize such expenses absent

express congressional direction. *See* slip op., *supra*, at 11-12, nn.11-14. Where the prior practice is as inconsistent as it was here, however, can it truly be known which prior practice Congress intended to reaffirm by its silence? The only fair inference is that the question is for the FLRA to decide, subject to reversal only if its determination is unreasonable. Thus, whether this Court should authorize any expenditures is simply not the issue here—the question is the reasonableness of the agency's decision.

The FLRA relied upon the express policies and purposes of the Act and the agency's consistent interpretation of the Act as being intended to equalize the positions of labor and management, subject to various express restrictions. The agency thus approved travel payments because they further the equalization trend, further the express purposes of the Act, and are not barred by any statutory restriction.[2] Such analysis may not be the only plausible

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[2] The agency also reasoned by analogy that federal employees traveling on "official time" are generally deemed to be on official business and, as such, are eligible for travel and per diem expenses. *See* 5 U.S.C. § 5702. The majority suggests that because this specific part of the agency's analysis refers to a statute outside the agency's expertise, no deference to the FLRA's decision is warranted. Slip op., *supra*, at 10. This ignores the fact that the core of the FLRA's analysis was based on its interpretation of federal labor relations policy, a matter within its specialized authority and deserving of obvious deference. The majority correctly points out that, in any event, deference does not require "rubber-stamping" decisions that are "inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Slip op., *supra*, at 9-10 (citations omitted). Nowhere is it shown, however, that the FLRA's decision violates any mandate or policy expressed in the enabling legislation.

interpretation, but it is a reasonable one and is well within the scope of the agency's authority. It must, therefore, be affirmed even under the standard of review recognized by the majority.

The contrary conclusion reached in this case is not required by the statute or its legislative history, which is conceded to be silent. It is not required by prior administrative practice, which is itself erratic and inconsistent. Moreover, it is not justified by the policy arguments relied upon by the majority, unless this Court is empowered to freely substitute its judgment for that of the agency. In my view, when Congress broadly empowers an independent agency to regulate federal labor relations, courts should not interfere with that agency's policy determination absent a clear showing that the decision is unreasonable, exceeds its authority, or is contrary to law. No such showing has been made here.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1981

No. 81-1948

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONER

vs.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

and

THE AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, INTERVENOR/RESPONDENT

Petition for Review of Order of the
Federal Labor Relations Authority

JUDGMENT

This cause came on to be heard on petition for review of an order of the Federal Labor Relations Authority, appendix, original administrative record and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order be, and it is hereby, denied in accordance with the opinion of this Court.

August 9, 1982

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1982

No. 81-1948

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONER

vs.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

and

THE AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, INTERVENOR/RESPONDENT

PETITION FOR REVIEW OF ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

The Court, having considered intervenor/respondent's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

September 14, 1982

APPENDIX D

6 FLRA No. 45

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 7-CA-570

U.S. DEPARTMENT OF AGRICULTURE SCIENCE AND EDUCATION ADMINISTRATION AGRICULTURAL RESEARCH, NORTH CENTRAL REGION, DAKOTAS-ALASKA AREA, RESPONDENT

and

LOCAL 3748, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, CHARGING PARTY

DECISION AND ORDER

This matter is before the Authority pursuant to Regional Director Gordon Brewer's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1 of the Authority's Rules and Regulations (5 CFR 2429.1(a)).

Upon consideration of the entire record in this case, including the parties' stipulation of facts, accompanying exhibits and briefs submitted by the Respondent and the General Counsel, the Authority finds:

The complaint herein alleges that the Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to grant travel authorizations and travel advances to, and refusing to pay the

travel and per diem expenses of, properly designated members of the Union negotiating team required to travel to the site for collective bargaining negotiations. The Respondent admits it acted as alleged, and also admits that such conduct is violative of the Statute as presently interpreted.[1] However, the Respondent urges that precedent be reversed. Thus it argues essentially that when Congress authorized "official time" for the negotiation of collective bargaining agreements in section 7131(a),[2] it did not intend to include within that authorization payment of travel and per diem expenses. In this regard, the Respondent takes the position that while a union representative at negotiations must be given official time for this activity, the term "official time" is intended only to grant representation rights for union representatives during duty hours and is not intended to grant entitlement to any type of expense payment. Essentially, the Respondent argues that as the payment of per diem and travel expenses was not provided for by the Executive Order, and the legislative

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[1] See, *Interpretation and Guidance*, 2 FLRA No. 31 (1979); *Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California*, 4 FLRA No. 40 (1980). See also, *Florida National Guard*, 5 FLRA No. 49 (1981).

[2] Section 7131(a). Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes[.]

history provides, in its view, no clear intent to change the Executive Order practice in this connection, the Statute must be interpreted as not providing for such payment.

Payment of per diem and travel expenses was denied to the following employees, who served as negotiating team members for the Union and who filed vouchers seeking payment: Curtis A. Klein, Charles Flakker, Bruce Boehm, Jane Prochazka and Doris Roden. Klein's vouchers included all four negotiating sessions conducted between the parties: May 5-9, 1980; June 9-13, 1980; July 21-25, 1980; and September 15-19, 1980. Boehm's vouchers included the July and September sessions, Flakker's voucher the May session, Prochazka's voucher the June session and Roden's the July session.

The Authority has considered the Respondent's arguments that established precedent (note 1, *supra*) be reversed, which arguments essentially are based on the Respondent's reading of the legislative history. However, no basis has been advanced to persuade the Authority that the established precedent is incorrect, nor has the Respondent raised any arguments not previously considered by the Authority in the cases cited. Thus, the Authority concluded in the *Interpretation and Guidance* decision based on an analysis of section 7101 of the Statute and the legislative history of section 7131 that "any employee who is on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement is entitled to payments from agencies for their duty time and travel and per diem expenses." Therefore, the Authority finds that the Respondent violated section 7116(a)(1) and (8) when it denied payment of per diem and travel expenses to employees on official time

under section 7131(a) of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement.[3]

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the U.S. Department of Agriculture, Science and Education Administration, Agricultural Research, North Central Region, Dakotas-Alaska Area, shall:

1. Cease and desist from:

(a) Failing or refusing as required by section 7131(a) of the Statute to provide payment of properly documented travel and per diem expenses incurred by Curtis A. Klein, Charles Flakker, Jane Prochazka, Doris Roden, and Bruce Boehm, or any other of its employees, as a result of their participation, on official time, as duly designated representatives of Local 3748, American Federation of Government Employees, AFL-CIO, the exclusive representative of the bargaining unit employees, in scheduled Union-Agency negotiation sessions.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide payment to Curtis A. Klein in reimbursement of the properly documented claims he has

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[3] Based on the above outcome, which fully remedies the violation found herein, the Authority finds it unnecessary to decide whether such conduct also violated section 7116(a)(5).

submitted for payment of the travel and per diem expenses he has incurred as a result of his participation, on official time, as a duly designated representative of the above Union, in Union-Agency negotiating sessions on May 5-9, 1980, June 9-13, 1980, July 21-25, 1980, and September 15-19, 1980.

(b) Provide payment to Charles Flakker in reimbursement of the properly documented claims he has submitted for payment of the travel and per diem expenses he has incurred as a result of his participation, on official time, as a duly designated representative of the above Union, in Union-Agency negotiating sessions on May 5-9, 1980.

(c) Provide payment to Jane Prochazka in reimbursement of the properly documented claims she has submitted for payment of the travel and per diem expenses she has incurred as a result of her participation, on official time, as a duly designated representative of the above Union, in Union-Agency negotiating sessions on June 9-13, 1980.

(d) Provide payment to Doris Roden in reimbursement of the properly documented claims she has submitted for payment of the travel and per diem expenses she has incurred as a result of her participation, on official time, as a duly designated representative of the above Union, in Union-Agency negotiating sessions on July 21-25, 1980.

(e) Provide payment to Bruce Boehm in reimbursement of the properly documented claims he has submitted for payment of the travel and per diem expenses he has incurred as a result of his participation, on official time, as a duly designated representative of the above Union, in Union-Agency negotiating sessions on July 21-25, 1980, and September 15-19, 1980.

(f) Post at its facilities at U.S. Department of Agriculture, Science and Education Administration, Agricultural Research, North Central Region, Dakotas-Alaska Area, copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the North Central Region and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(g) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 15, 1981

/s/ Ronald W. Haughton
RONALD W. HAUGHTON
Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III
Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE
Member
FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX E

2 FLRA No. 31

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

Case Nos. 0-PS-3 and 0-PS-6

INTERPRETATION AND GUIDANCE

As previously announced,[1] the Authority determined, in conformity with its rules and regulations and the Federal Service Labor-Management Relations Statute (92 Stat. 1191), that an interpretation of the Statute was warranted on the following:

1) Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

2) Whether the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Concurrently, the Authority invited interested persons to express their views in writing with respect to the above matters, including the impact, if any, of section 7135(a)(1) of the Statute (92 Stat. 1215) on these matters. The responses submitted to the Au-

[1] Federal Labor Relations Authority, *Notice Relating to Official Time*, 44 Fed. Reg. 42,788 (July 20, 1979).

thority were most thorough and helpful and have been carefully considered. In view of the depth and scope of these submissions, the Authority has determined that no useful purpose would be served by providing for an oral presentation of views.

Section 7131 of the Statute

As indicated above, both matters at issue pertain to section 7131 of the Statute (92 Stat. 1214), which reads as follows:

> § 7131. *Official time*
>
> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official

time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section —

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this [Statute], any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

We turn to the application of the above-quoted provisions, and particularly section 7131(a), to the matters here in question. For convenience of discussion, we shall consider the questions in reverse order.

Nature of Negotiations to Which Official Time Applies

The second of the two matters at issue is the following:

> Whether the official time provisions of section 7131(a) of the Statue encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Section 7131(a) expressly states in relevant part that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official

time for such purposes, including attendance at impasse proceeding[s]." This section thus provides that when an exclusive representative and an agency undertake the negotiation of a "collective bargaining agreement," an employee representing the exclusive representative in that undertaking must be authorized official time for such purposes.

In this connection, the phrase "collective bargaining agreement" in section 7131(a) is defined at section 7103(a)(8) (92 Stat. 1193), as follows:

> (8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this [Statute].

The phrase, "collective bargaining," in turn, is defined in section 7103(a)(12) (92 Stat. 1194) as follows:

> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession[.]

It is apparent from the specific language in these definitions that a "collective bargaining agreement" is any agreement that is entered into as a result of the

performance of the mutual obligation of the parties to bargain in a good-faith effort to reach agreement with respect to conditions of employment affecting employees in the appropriate unit. Consequently, the language reflects the intent of Congress that the entitlement of official time under section 7131(a) would encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Such conclusion as to the intent of Congress is supported by the legislative history of section 7131(a) of the Statute. More particularly, section 7131(a) is identical to section 7132(a) of the Bill (H.R. 11280) reported to the House by the House Post Office and Civil Service Committee.[2] In adopting the provisions in section 7132(a) of the House Bill, Congress rejected the relevant language in section 7232 of the Bill (S. 2640) reported to the Senate by the Senate Governmental Affairs Committee.[3] That section of the

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[2] *See* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 288 (1978).

[3] Section 7232 of the Senate Bill provided:

> Solicitation of membership or dues and other internal business of a labor organization shall be conducted during the nonduty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except that the negotiating parties may agree to arrangements which provide that the agency will authorize a reasonable number of such employees (not normally in excess of the number of management representatives) to negotiate on official time for up to 40 hours, or up to one-half the time spent in negotiations during regular working hours.

Senate Bill had sought, in effect, to maintain the restrictions imposed upon the use of official time for negotiations by employees representing unions as established in E.O. 11491, as amended.

Significantly, as to section 7232 of the Senate Bill, the Senate Committee Report had stated that it applied "to the negotiation or renewal of a *basic* collective bargaining agreement, *as opposed* to negotiations which arise out of circumstances during the term of the basic agreement" (emphasis added).[4] The House Bill which was adopted by Congress contains wholly different provisions on the relevant subject of official time, and there is no indication whatsoever that Congress intended to limit the use of official time to the negotiation of basic agreements as contemplated by the rejected language of the Senate Bill.

Thus, the legislative history demonstrates that Congress intended, consistent with the specific language of section 7131(a) and the related definitions in section 7103(a)(8) and (12), that the entitlement of official time under section 7131(a) would apply whenever the parties undertake the negotiation of a collective bargaining agreement.

Apart from the literal language and legislative history of section 7131(a) of the Statute, the conclusion that Congress intended that official time apply to the negotiation of any collective bargaining agreement is supported by the express findings and purpose of the Statute as stated in section 7101(a), namely, that "labor organizations and collective bargaining in the civil service are in the public interest." Certainly, it would implement the ends of collective bargaining to

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[4] S. Rep. No. 95-969, 95th Cong., 2d Sess. 112 (1978).

sanction official time for all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement. For only in such manner may effective union representation comparable to the representation of management be achieved under the Statute, and only in this manner may both parties effectively fulfill their respective obligations under section 7114(b) of the Statute (92 Stat. 1202) "to meet at reasonable times . . . as frequently as may be necessary" for good-faith negotiations on conditions of employment of the unit employees.

Accordingly, for the reasons stated above, it is concluded that the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Entitlement of Employees on Official Time to Travel and Per Diem Expenses

As mentioned at the outset, the other matter here at issue is the following:

> Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

On this issue it is clear from the Statute that employees who are on official time under section 7131 while representing an exclusive representative in the

negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

As previously set forth, section 7131(a), which is principally here involved, provides that an employee representing an exclusive representative in the negotiation of a collective bargaining agreement shall be on official time "during the time the employee otherwise would be in a duty status." As explained in the House Report, an employee serving as a union represenative is authorized "paid time" while engaging in the negotiation activities provided for in section 7131 (a) of the Statute.[5] Hence, while an employee is on official time representing an exclusive representative in the negotiation of a collective bargaining agreement, that employee is on paid time entitled to his or her usual compensation and is not in leave status.

Neither the Statute, nor its legislative history, expressly adverts to the payment of travel expenses or per diem during participation in these negotiation activities.[6] However, it is well established that such

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[5] H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978).

[6] Under section 20 of E.O. 11491, as amended, travel expenditures were not authorized for union representatives engaged in negotiation activities (*Labor-Management Relations in the Federal Service* (1975) at 58). However, as previously indicated, Congress substantially rejected section 7232 of the Senate Bill which sought in effect to maintain the language of the Order. Moreover, unlike under section 20 of the Order which strictly limited the amount of official time which might be authorized for negotiation activities by union representatives, section 7131(a) of the Statute contains no such limitation. Further, unlike under the Order, the encouragement of collective bargaining is a stated purpose of the Statute.

expenses are authorized when an employee "is engaged on official business for the Government" (Chapter 57, Subchapter I—*Travel and Subsistence Expenses; Mileage Allowances*, 5 U.S.C. § 5701, *et seq.*). As already mentioned, Congress, in adopting the Statute, specifically found in section 7101(a) that collective bargaining "contributes to the effective conduct of public business," and that "collective bargaining in the civil service [is] in the public interest." Further, Congress expressly mandated in sections 7114 and 7116(a)(5) and (b)(5) that such negotiations be conducted in good faith by the parties involved (92 Stat. 1202, 1204). Thus, an employee, while negotiating a collective bargaining agreement as a union representative and while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on "official business for the Government."

Additionally, it is not controverted that management representatives are uniformly paid travel expenses and per diem when engaged in the negotiation of a collective bargaining agreement on behalf of management, and Congress indicated its intent that similar prerogatives be accorded employees serving as union representatives likewise engaged in the negotiation of a collective bargaining agreement. In this connection, Representative Clay, in discussing the proscription of official time for employees engaged in internal union business under section 7132(b) of the House Bill (which was enacted as section 7131(b) of the Statute) stated as follows: [7]

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal

[7] 124 Cong. Rec. H9,638 (daily ed. Sept. 13, 1978).

> business of a labor organization. . . . Activities that involve labor-management contacts are not included in this section. . . . Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. [Emphasis added.]

The payment of travel and per diem expenses would not only more nearly equate the status of union and management negotiators as contemplated by Congress, but would also facilitate more effective union representation at the bargaining table, thereby implementing the purpose of the Statute, as reflected in section 7101(a), to encourage collective bargaining in the Federal sector.

Finally, it should be noted that section 7131(c) of the Statute, identical as here relevant to section 7131(a), provides that:

> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority *shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.* [Emphasis added.]

The Authority has previously interpreted this language of the Statute in section 2429.13 of its Interim Rules and Regulations, as entitling the employee on such official time to transportation and per diem expenses (44 Fed. Reg. 44771 (July 30, 1979)). No persuasive reason has been advanced for a contrary

interpretation of the analogous language in section 7131(a) of the Statute, and no supported challenge has been advanced regarding the legality of the Authority's prior interpretation of the same critical language in section 7131(c).

In summary, any employee who is on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement is entitled to payments from agencies for their duty time and travel and per diem expenses.

Impact of Savings Provisions in the Statute

Lastly, the question as to the impact, if any, of the savings provisions in section 7135(a)(1) of the Statute on the above matters must be considered.[8] More specifically, the question is whether provisions in existing agreements which are more restrictive than section 7131(a) on the granting of official time, as well as the payment of travel and per diem expenses, for employees representing a union in the negotiation of a collective bargaining agreement, remain operative under section 7135(a)(1) of the Statute.

Section 7135(a) reads in relevant part as follows:

> (a) Nothing contained in this [Statute] shall preclude—
>
> (1) the renewal or continuation of . . . a lawful agreement between an agency and an exclusive

[8] The savings clause in section 7135(b) of the Statute (92 Stat. 1215) is clearly without impact, since the provisions of section 7131(a), which are here involved, are completely different from the related provisions in section 20 of E.O. 11491, as amended, and section 7131(a) thereby "supersedes" the "policies, regulations, and procedures established under" the Executive Order.

> representative of its employees, which is entered into before the effective date of this [Statute][.]

By this express language of section 7135(a)(1), nothing in the Statute precludes the parties to a lawful agreement in existence on January 11, 1979, the effective date of the Statute, from mutually renewing or continuing the terms of that agreement if they so desire. Thus, for example, if the provisions of an existing agreement limit the authorization of official time to employee representatives of a union in the negotiation of a basic collective bargaining agreement, nothing in the Statute precludes the parties to such an existing agreement, if they wish, from mutually renewing or continuing the terms of that agreement.

However, where a labor organization or an agency objects to the continuation or renewal of a provision relating to official time more restrictive than section 7131(a), such objection prevents the continuation or renewal of the agreement provision under section 7135(a)(1) of the Statute. In that situation, the provisons of section 7131(a) would be immediately operative. That is, any employee representing an exclusive representative in the negotiation of a collective bargaining agreement would be entitled to official time, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement, and any employee on such official time under section 7131(a) of the Statute would be entitled to payments from the agency for their travel and per diem expenses.

Conclusion

It is the Authority's interpretation and guidance that:

1. The official time provisions of section 7131(a) of the Statute encompass negotiations between an exclu-

sive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

2. Employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entiled to payments from agencies for their duty time and travel and per diem expenses.

3. Provisions in agreements existing on January 11, 1979, the effective date of the Statute, which are more restrictive than section 7131(a) of the Statute on the granting of official time, as well as the payment of travel and per diem expenses, for employees representing a union in the negotiation of a collective bargaining agreement may be renewed or continued if the parties so desire, under section 7135(a)(1) of the Statute. However, if either party to such provisions in an existing agreement objects to the continuation or renewal thereof, such objection prevents the continuation or renewal of those agreement provisions under section 7135(a)(1) of the Statute.

Issued, Washington, D.C., December 19, 1979.

/s/ Ronald W. Haughton
RONALD W. HAUGHTON, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE, Member
FEDERAL LABOR RELATIONS AUTHORITY

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 393407 1187

Supreme Court, U.S.
FILED
JAN 17 1983
ALEXANDER L. STEVAS
CLERK

No. 82-979

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

REX E. LEE
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Washington, D.C. 20530
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FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

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MEMORANDUM FOR THE FEDERAL RESPONDENT

Petitioner contends that Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires that a federal agency pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency.

On four occasions in 1980, five employees of respondent, the Department of Agriculture, traveled to Fargo, North Dakota, from other locations to participate as union negotiators in collective bargaining with the agency. Respondent granted the employees time off from their usual duties, but denied a request that it pay the employees' travel expenses and per diem (Pet. App. 8a). Respondent American Federation of Government Employees, the union that the employees represented, filed an unfair labor practice charge with petitioner, the Federal Labor Relations Authority. Petitioner determined (*id.* at 28a-33a) that the Department

of Agriculture had committed an unfair labor practice and ordered it to pay the disputed expenses. Petitioner based its order on its belief that the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires a federal agency to pay travel expenses and per diem allowances to employee union representatives engaged in collective bargaining with the agency.

On petition for review of that decision, the court of appeals concluded (Pet. App. 1a-24a) that deference to petitioner's interpretation of the statute was inappropriate and that petitioner had interpreted Section 7131(a) incorrectly. Therefore, the court refused to enforce petitioner's order. The court of appeals noted (Pet. App. 18a n.19) that its decision was consistent with the decision of the Second Circuit in *Division of Military and Naval Affairs, State of New York* v. *FLRA*, 683 F.2d 45 (1982), petition for cert. pending, No. 82-1021 (filed Dec. 16, 1982), and in direct conflict with the decision of the Ninth Circuit in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 672 F.2d 732 (1982), petition for cert. pending, No. 82-799 (filed Nov. 10, 1982).

In *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, petition for cert. pending, No. 82-799 (filed Nov. 10, 1982), the Solicitor General, on behalf of the Bureau of Alcohol, Tobacco and Firearms, has sought review of the Ninth Circuit decision to which the court below referred. In that case the FLRA ordered the BATF to pay travel expenses and a per diem allowance to an employee union representative who had engaged in collective bargaining with BATF. The Ninth Circuit enforced that order, holding that the FLRA's interpretation of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), is correct. Thus, the petition in the *Bureau of Alcohol, Tobacco and Firearms* case presents the same issue that is raised in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and disposed of in light of the disposition of *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, No. 82-799.

REX E. LEE
Solicitor General

JANUARY 1983

DOJ-1983-01